No. 01-348

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOE CARRABBA, JR., et al.,
Individually and on Behalf of
All Others Similarly Situated,

Petitioners,

v.

RANDALLS FOOD MARKETS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVID T. HARVIN
(*Counsel of Record*)
WALLIS M. HAMPTON
VINSON & ELKINS L.L.P.
2300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2368
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED (RESTATED)

Whether pension plan participants can assert a claim for benefits due under 29 U.S.C. § 1132(a)(1)(B) if upon plan termination they received all the benefits they were entitled to receive under the plan, but not all the benefits they were entitled to receive under ERISA?

PARTIES TO THE PROCEEDING

In addition to the persons identified in the Petition for a Writ of Certiorari, Rafael Ferrer is a named Plaintiff. Additionally, the Class Members who are not named Plaintiffs are:

Acker, Ricky
Adamcik, Ben
Adams, Alan
Allen, Dodd
Allen, Phillip
Anderson Sr., Jeff
Anderson, John
Arledge, Tom
Autry, Anthony
Avery, James
Barron, Glendon
Barrow, Charles
Beaird, Walter
Becker, Greg
Becker, Steve
Blanton, Scott
Boatright, Greg
Boniol, Michael
Bourland, Ronny
Boyles, Sanford
Brackett, Tommy
Brisko, Thomas
Bronstein, Neil
Brooks, Lewis
Brown, Velma
Burke, Thomas
Burleson, Cynthia
Butler, Gary
Call, Dale
Capley, Luther
Carlyle, Kevin
Carter, Eddy
Cawyer, Roscoe
Chasteen, Anthony
Cluff, Kathy
Colbert, Anthony
Cook, Barry
Cooper, Bill
Cooper, George
Cox Jr., Elmer
Cox, James
Crawford, Marsha
Cruz, Julie Saldana
Cullum, Brooks
Curtis-Powell, Leanne
Dalton, David
Danford, Gary
Davis, Jimmy
Davis, Kenneth
Dayton, Greg
De Zeeuw, Mark
Dean, Dona
Deibler, Mark
Dietert, Douglas
Dolphin, Robert
Dowling, Jeffery

PARTIES TO THE PROCEEDING – Continued

Dubois, Parry
Ducote, Neil
Duggan, Greg
Duncan, Fred
Dyer, Harold S.
Ely, Gary
Embree, Barry
Embree, Julia
England Jr., Ray
Esquivel, David
Eure, Clyde
Evans Jr., Jack
Farley, Chris
Figura, Tim
Forsythe, James
Freeman, James
Fry, Cynthia Williams
Fry, Ron
Gale, Cristi Curtsinger
Garcia, David
Gay, Richard
Gonzalez, Leon
Goodwin, William
Gravley, Lowery F.
Green, Joe T.
Greenlee, Robert
Gregg, Kimberlyn
Hardy, Kirby
Harrell, Lisa
Harrison, Dorothy
Headrick, Jerry
Henry, Jeff
Hertel, William
Hill, Gregg
Hiltz, Richard
Hobbs, Robert
Holmes, Billy
Holmes, Houston
Holsemback, Terry
Hoskins, J.D.
Hubbard, Everett
Huff, Robert
Infante, Juan
Jack, Dan
Jensen, Patricia
Johnson, Doyle
Jordan, Kenneth
Kelley, Tom H.
Kelly, Claire
King Jr., James
Kirkpatrick, Jay
Kizer, Gary
Knox, Rebecca
Kruse, Melvin
Kuhn, Julie
Kuhn, Melvin
Landess, Richard
Laws, Patricia
Lawson Jr., Daniel
Lawson, Susan Barre
Lewis, Hugh
Loonan, Mike
Losawyer, Mike
Luttrell, Larry
Mahaffey, Monica
Mahoney, Greg

PARTIES TO THE PROCEEDING – Continued

Marcangelo, John
Martin, Robert
Martinez, Juan
Mathews, Dina Winn
Matthews, Brent
Maupin, William "Hank"
McCarthy, J.K.
McCullin, James
McGowan Jr., M.L.
McKnight, Richard
Meadors, Donald
Michels, James
Mix, John
Moore, William
Morreira, Karen
Naik, Ketan
Needham, Donald
Neiman, Rosario M.
Nelson, Elijah
Parrish, Jimmy
Partee, Charles
Pawless, Joy
Pawlick, Dale
Peck, Matt
Pels, Kevin
Peters, Ronald
Petersen, Patti
Phillips, Eddie
Phillips, Melinda Simmons
Pidgeon, Thurman
Pierson, Kerry
Plemons, Michael
Pollard, Rock
Pratt, Becky
Puetz, Gerry
Rangel, Sam
Reece, Thomas
Reswik, Timothy
Risner, Charles
Rodgers, Scott
Rodriguez, Efrain
Rodriguez, Roland
Rohrer, John
Rothmeyer, K.
Roussell, John
Scoggins, Frances
Settle, Leslie
Shackelford, Tom
Shedenhelm, Larry
Shermer, Dayton
Shipley, Thomas L.
Shivers, John
Skipworth, Ronald
Slovacek, Yvonne
Smith, Dennis
Smith, Marilyn
Sneed, Langford
Song, Dennis
Spofford, David
Stark, Barbara
Stiles, James
Tate, Chris
Taylor, Mike
Teague, William M.
Tort, Mario
Trapp, Stephen
Traver, Bert
Treadway, Lee
Trewin, Ellen
Tribble, Patricia

PARTIES TO THE PROCEEDING – Continued

Turner, Tommy
Tuttle, Lonnie
Wallick, Scott
Ward, Judy
Warner, Jeff
Warren, Wendell
Washington, Archie
Wilkinson, Lua
Willey, William
Williams, Benny
Williams, James
Williams, John
Wilson, James
Witherington, Richard
Wong, Alex
Woodson, Douglas
Youngblood, Mike
Zigrang, William

The Respondent is Randalls Food Markets, Inc. Respondent is a wholly-owned subsidiary of Safeway Inc.

TABLE OF CONTENTS

Page

Question Presented (Restated) i

Parties to the Proceeding ii

Table of Contents..... vi

Table of Authorities viii

Statutes Involved..... 1

Statement of the Case 1

I. Background to this Lawsuit..... 1

II. History of this Lawsuit 4

Summary of Argument 6

Reasons for Denying the Writ 8

I. The Fifth Circuit properly concluded that petitioners did not have a claim for benefits due 8

A. Plaintiffs cannot assert a claim for benefits due because Randalls paid them everything they were entitled to receive under the MSP 8

B. Plaintiffs cannot recover the benefits they had hoped to receive when they retired at age 65 under the guise of a claim for benefits due 9

1. Plaintiffs' damages theory requires this Court to assume that their age 65 benefits fully accrued and vested the instant they joined the MSP 9

TABLE OF CONTENTS – Continued

Page

2. Plaintiffs' unprecedented theory conflicts with the decisions of other courts considering this issue 11

3. The Fifth Circuit's decision fully vindicated the policies recognized by this Court in *Central States* 13

4. Neither ERISA's fiduciary duty provision nor trust law supports the conclusion that Plaintiffs' age 65 benefits were fully vested and accrued 17

5. None of ERISA's remaining statutory provisions supports Plaintiffs' argument 19

II. The award of equitable relief was not an abuse of discretion 20

III. In any event, the question presented by the petition does not need Supreme Court resolution 22

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES

Berard v. Royal Elec., Inc., 795 F. Supp. 519 (D.R.I. 1992) 15

Blessitt v. Retirement Plan for Employees of Dixie Engine Co., 848 F.2d 1164 (11th Cir. 1988) 15, 16

Bryant v. Food Lion, Inc., 774 F. Supp. 1484 (D.S.C. 1991) 14

Carrabba v. Randalls Food Markets, Inc., 145 F. Supp. 2d 763 (N.D. Tex. 2000) 5

Carrabba v. Randalls Food Markets, Inc., 252 F.3d 721 (5th Cir. 2001) 6

Carrabba v. Randalls Food Markets, Inc., 38 F. Supp. 2d 468 (N.D. Tex. 1999) 4

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985) 13, 22

Clair v. Harris Trust & Sav. Bank, 190 F.3d 495 (7th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000) 8

Corcoran v. United HealthCare, Inc., 965 F.2d 1321 (5th Cir. 1992) 8, 9

DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund, 975 F. Supp. 258 (S.D.N.Y. 1997) 11

Gable v. Sweetheart Cup Co., 35 F.3d 851 (4th Cir. 1994) 15

Hein v. TechAmerica Group, Inc., 17 F.3d 1278 (10th Cir. 1994) 12, 20

Hollingshead v. Burford Equip. Co., 809 F. Supp. 906 (M.D. Ala. 1992) 13, 20, 22

TABLE OF AUTHORITIES – Continued

Page

Hollingshead v. Burford Equip. Co., 747 F. Supp. 1421 (M.D. Ala. 1990) 12, 13

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 19

Hummell v. S.E. Rykoff & Co., 634 F.2d 446 (9th Cir. 1980) 11

In re Syntex Fabrics, Inc. Pension Plan, 698 F.2d 199 (3d Cir. 1983) 15

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 8

May v. Houston Post Pension Plan, 898 F.2d 1068 (5th Cir. 1990) 15

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 14

Montgomery v. Lowe, 507 F. Supp. 618 (S.D. Tex. 1981) 11

Nedrow v. McFarlane & Hayes Co. Employees' Profit Sharing Plan & Trust, 476 F. Supp. 934 (E.D. Mich. 1979) 12

Northeast Dep't ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147 (3d Cir. 1985) 17, 18, 22

PBGC v. Heppenstall Co., 633 F.2d 293 (3d Cir. 1980) 15

PBGC v. LTV Corp., 496 U.S. 633 (1990) 14, 15

TABLE OF AUTHORITIES – Continued

Page

Ramirez v. Lowe, 504 F. Supp. 21 (S.D. Tex. 1979), *aff'd*, 639 F.2d 306 (5th Cir. 1980) 11

Spacek v. Maritime Ass'n, ILA Pension Plan, 134 F.3d 283 (5th Cir. 1998) 15

Wise v. El Paso Natural Gas Co., 986 F.2d 929 (5th Cir. 1993) 15

STATUTES

29 U.S.C. § 1002(19) 19

29 U.S.C. § 1002(23)(A) 19

29 U.S.C. § 1051(2) 1, 2

29 U.S.C. § 1053(a) 1, 2

29 U.S.C. § 1054(a) 1

29 U.S.C. § 1054(b) 1, 2

29 U.S.C. § 1102(a) 19

29 U.S.C. § 1104 17

29 U.S.C. § 1132(a) 1, 5

29 U.S.C. § 1132(a)(1)(B) 5, 6, 8, 9, 13

29 U.S.C. § 1132(a)(3) 5, 7, 20, 21

29 U.S.C. § 1341(a) 15

RULES

SUP. CT. R. 10 ..... 8, 23

SUP. CT. R. 24(f) 1

STATUTES INVOLVED

In addition to the statutes reproduced in Plaintiffs' Petition for a Writ of Certiorari, the following statutes are at issue in this lawsuit:

29 U.S.C. § 1051(2)
29 U.S.C. § 1053(a)
29 U.S.C. § 1054(a), (b)
29 U.S.C. § 1132(a)

Pursuant to SUP. CT. R. 24(f), the relevant text of these statutes is set out verbatim in the Appendix to Respondent's Brief in Opposition.

STATEMENT OF THE CASE

I. Background to this Lawsuit.

This lawsuit concerns a "top hat" pension plan that Cullum Companies, Inc. ("Cullum"), a Texas-based grocery chain, established in 1974 for its management. The plan was known as the Management Security Plan (the "MSP" or the "Plan"). Under ERISA, which was enacted in the same year, a top hat plan is

> a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.

29 U.S.C. § 1051(2). As the district court found, Cullum intended the MSP to be a top hat plan and structured it to satisfy that exception. (App. at 8-10, 16-18)[1]

Top hat plans are not subject to ERISA's minimum vesting and accrual requirements.[2] *See* 29 U.S.C. § 1051(2). Believing the MSP was a top hat plan, Cullum did not draft it to comply with these minimum requirements. For instance, the MSP's basic plan document provided that a participant's benefits neither vested nor accrued until retirement. (AX 3 ¶¶ 4.4, 4.5) Paragraph 4.1 of the basic plan document, which every participant received, expressly set forth the conditional nature of these benefits:

> *If* a Participant has remained an Employee until age sixty-five (65) and shall then Retire, and *if* this Program and his Plan Agreement have been kept in force, the Company will pay or cause to be paid to such Participant as a Retirement Benefit (herein so called), the amount per month specified in his Plan Agreement.

(AX 3 ¶ 4.1) (emphasis added))

Thus, a key condition to the receipt of a retirement benefit was that the MSP itself remain in existence. But

---

[1] "App." refers to the Appendix that Plaintiffs filed with their Petition for a Writ of Certiorari.

[2] ERISA requires pension plans to accrue and vest pensioners' benefits at certain minimum rates. *See* 29 U.S.C. §§ 1053(a), 1054(b). The accrual provisions require employers to credit pensioners with a certain portion of their retirement benefit each year they participate in the plan. Vesting measures what amount of the accrued benefit cannot be eliminated.

the basic plan document clearly warned participants that the MSP could be terminated at any time:

> The Company reserves the right to terminate, amend, modify or supplement this Program, wholly or partially, and from time to time, at any time. . . . Upon the termination of this Program or any Plan Agreements, . . . neither this Program nor the Plan Agreement shall be of any further force and effect, and no party shall have any further obligation under either this Program or any Plan Agreement so terminated.

(AX 3 ¶¶ 10.1, 10.2) The plan agreements that participants executed each year also expressly stated that Cullum "reserves the right to terminate any employee's participation in the Plan or to terminate or modify the terms, conditions, or benefits provided by the Plan." (AX 3, Annex I ¶ 7) In signing the plan agreement, each participant also acknowledged,

> I understand that the Plan and this Plan Agreement may be terminated at any time, in the sole discretion of the Company, without any obligation of any nature whatsoever to the Company, except a Participant shall have those rights provided for [to] the extent such may be applicable to him at the time of such termination.

(AX 3, Annex I)

The plan agreements detailed what participants would receive if Cullum terminated the Plan. They disclosed that "upon any termination of the Plan, the Company, after payment of all involuntary termination benefits, may in its absolute discretion pay any additional benefits the Committee may determine." (AX 3, Annex I

¶ 7) The only involuntary termination benefit under the MSP was "an amount equivalent to all of [the participant's] deferrals to the Plan." (AX 3, Annex I ¶ 6)

In 1992 Randalls Food Markets, Inc. ("Randalls") acquired Cullum. Consistent with the Plan's terms, Cullum had advised Randalls during their negotiations that if Randalls terminated the MSP, it would owe the participants only the return of the salary deferrals they had made while participating in the Plan. Randalls subsequently elected to terminate the MSP. When Randalls terminated the Plan it paid each participant at least the amount of his or her salary deferrals, with many long-term employees receiving additional amounts based on their years of service.

II. History of this Lawsuit.

Plaintiffs are former Cullum employees who were participating in the MSP when it was terminated. In 1996 they filed this class action lawsuit against Randalls, alleging that the MSP was not an exempt top hat plan and seeking to recover the additional retirement benefits they claimed would be due them if the MSP had been subject to ERISA's vesting and accrual requirements. Because Plaintiffs would have a claim only if the MSP were not an exempt top hat plan, the district court first considered that issue. The court certified for trial a mandatory class consisting of all MSP participants at the time the Plan terminated (the "Class"). (App. at 4) After a bench trial, the court issued its opinion on February 18, 1999. *See Carrabba v. Randalls Food Markets, Inc.*, 38 F. Supp. 2d 468 (N.D. Tex. 1999). (App. at 2-23) While the court found

that Cullum "at all times intended the MSP to be a top hat plan and operated on a good-faith belief that it so qualified," it nonetheless concluded that Randalls had not established that the MSP was a top hat plan. (App. at 21-22)

In the second phase of the trial proceedings, the court considered the relief due the Class. To determine the Class's remedy for the MSP's failure to comply with ERISA's minimum vesting and accrual requirements, the court applied ERISA's civil action provision, 29 U.S.C. § 1132(a). Two of the potential remedies available under that section are relevant in this case:

- Section 1132(a)(1)(B) provides what Plaintiffs concede is a "breach of contract type remedy" under which a plan participant can recover the benefits due him under the terms of the plan. (Petition at 8)

- Section 1132(a)(3) allows courts to fashion "appropriate equitable relief . . . to redress any act or practice which violates any provision of [ERISA]."

After a second bench trial, the district court issued its opinion on April 11, 2000. *See Carrabba v. Randalls Food Markets, Inc.*, 145 F. Supp. 2d 763 (N.D. Tex. 2000). (App. at 24-58) The court concluded that the plan participants did not have a Section 1132(a)(1)(B) claim because they had received all they were entitled to receive under the strict terms of the Plan, the return of their salary deferrals. (App. at 34-35) Instead, the court determined that the Class was entitled to "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3).

The district court concluded that "equity would be served" if the Class was put in the same financial position it would have occupied had Cullum complied with ERISA's minimum vesting and accrual requirements. (App. at 35) Based on the actuarial evidence presented at the trial, the court awarded the Class $6.7 million. This award gave the Class "essentially the same financial benefits they would have received if the plan sponsor had recognized, and given effect to, the accrual and vesting requirements of ERISA." (App. at 46)

Plaintiffs want more. They contend that they are entitled to all the benefits that would have accrued to them in the future had the MSP not been terminated and had they continued to participate in the MSP until they retired at age 65 – a figure of $180 million. (Petition at 9) The Fifth Circuit rejected this argument and affirmed the district court's "conscientious, well-reasoned opinions." *See Carrabba v. Randalls Food Markets, Inc.*, 252 F.3d 721 (5th Cir. 2001). (App. at 1) Because the Fifth Circuit's decision was correct, this Court should not grant Plaintiffs' Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

Section 1132(a)(1)(B) provides a remedy where plan participants do not receive all they are entitled to receive under the strict terms of a benefit plan. In this case, Randalls paid Plaintiffs all they were entitled to receive under the MSP upon its termination. Consequently, the Fifth Circuit properly held that Plaintiffs could not recover under Section 1132(a)(1)(B). Plaintiffs argue that

they had a claim for benefits due under the Plan if the court ignored its "illegal" vesting and accrual provisions. This argument is founded not on the strict terms of the Plan, but rather on an assumption regarding vesting and accrual that Plaintiffs contend the court should have used in place of the "illegal" vesting and accrual provisions – namely, that Plaintiffs' benefits had fully vested and accrued immediately upon their entry into the Plan. However, there is no legal, factual, or equitable basis for their argument that the court was required to indulge this assumption. Indeed, Plaintiffs cannot cite a single case in which a court has ever done so.

Section 1132(a)(3) authorizes equitable relief where pensioners received all they were entitled to receive under the terms of a plan, but not all the benefits they were entitled to receive under ERISA. Because Plaintiffs' claims arose from their failure to receive the benefits that ERISA required to be vested and accrued, the district court's decision to award equitable relief was entirely proper. The court fully vindicated ERISA and its objectives by awarding Plaintiffs the additional benefits that ERISA required to be vested and accrued. This award was not an abuse of discretion.

Moreover, this case does not present important issues on which the lower federal courts need guidance. The issue in this case does not arise frequently, and the results have not been controversial. In addition, despite their attempts to manufacture a "conflict," Plaintiffs cannot identify a decision by this Court or a court of appeals that conflicts with the Fifth Circuit's *per curiam* decision in this

case. Consequently, this Court should not grant the Petition for a Writ of Certiorari. *See generally* SUP. CT. R. 10.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit properly concluded that petitioners did not have a claim for benefits due.

A. Plaintiffs cannot assert a claim for benefits due because Randalls paid them everything they were entitled to receive under the MSP.

Plaintiffs cannot assert a claim for benefits due under Section 1132(a)(1)(B) because they got everything they were entitled to receive under the Plan. Section 1132(a)(1)(B) creates a statutory cause of action for breach of contract. It authorizes a plan participant to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). It applies "[w]hen a beneficiary simply wants what was supposed to have been distributed under the plan." *Corcoran v. United HealthCare, Inc.*, 965 F.2d 1321, 1335 (5th Cir. 1992); *see also Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 497 (7th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000). Any recovery greater than a participant is entitled to receive under a plan's strict terms is an impermissible award of extra-contractual damages. *See Corcoran*, 965 F.2d at 1335. As this Court has established, extra-contractual damages are not recoverable under Section 1132(a)(1)(B). *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985).

As the district court found, the MSP provided that participants were entitled only to the return of their salary deferrals upon plan termination. (App. at 33) Plaintiffs do not dispute this finding. (Petition at 6) The district court also found that each of the participants received at least their total salary deferrals upon plan termination. (App. at 34-35) Plaintiffs do not dispute this finding either. Therefore, the Fifth Circuit correctly held that Plaintiffs did not have a claim for benefits due. *See generally Corcoran*, 965 F.2d at 1335.

B. Plaintiffs cannot recover the benefits they had hoped to receive when they retired at age 65 under the guise of a claim for benefits due.

1. Plaintiffs' damages theory requires this Court to assume that their age 65 benefits fully accrued and vested the instant they joined the MSP.

Plaintiffs do not claim that they were entitled to recover under the MSP's literal terms. Instead, they argue that when resolving the Section 1132(a)(1)(B) claim the Fifth Circuit was obligated to ignore the Plan's "illegal" terms – that is, the provisions that failed to comply with ERISA's vesting and accrual requirements. (Petition at 9-10) However, simply ignoring those provisions would not do Plaintiffs any good, as the Plan then would be silent as to how to measure the vested and accrued benefits due the participants upon plan termination. Therefore, Plaintiffs also contend that the Fifth Circuit was required to assume as a matter of law that each participant's age 65 retirement benefit was fully accrued and vested the instant he first joined the Plan. Consequently,

according to Plaintiffs, when Randalls terminated the MSP it was obligated to pay each participant his age 65 retirement benefit.

Neither logic nor the evidence at trial supports such an assumption. Under Plaintiffs' theory, a 25-year-old could join the MSP on day one, quit work on day two, and be entitled to a fully accrued and vested retirement benefit at age 65. For example, Plaintiffs claim that Julia Embree is entitled to a $915,889 retirement benefit even though she was only 27 and had worked for Cullum for only 2.19 years when the MSP was terminated. (38 R. 9382; AX 138, Tab B) Several other Class Members also each "earned" retirement benefits of over $840,000 even though they were less than thirty years old and had worked at Cullum less than three years when the MSP was terminated. (38 R. 9382; AX 138, Tab B) If Plaintiffs are correct, these young participants accrued far greater retirement benefits than higher-salaried executives who had worked for Cullum for many years and participated in the MSP since its inception in 1974. (38 R. 9380-81, 9385; AX 138, Tab B)

The uncontradicted evidence at trial was that no such pension plan would ever exist in the real world. Plaintiffs' own pension plan expert conceded that ERISA does not require benefits to fully vest and accrue immediately upon entry into a plan. (49 R. 102) He further conceded that ERISA plans do not normally operate this way, but rather accrue benefits ratably over time. (49 R. 102-03) Randalls' pension plan expert testified that he has never seen an ERISA plan that provided for immediate vesting and accrual of benefits. (49 R. 240) In his opinion, no company would ever adopt such a plan because it would

be too expensive and would provide no incentive for employees to stay with the company. (49 R. 241-42) In short, the plan that Plaintiffs argue the court was required to assume is one that no rational employer would ever give its employees.

More importantly, the fact that Plaintiffs are required to substitute assumptions about vesting and accrual for the Plan's unlawful terms demonstrates that they do not have a claim for benefits due under the strict terms of the Plan. Rather, as the distict court properly found, their remedy must be an equitable remedy to redress the violations of ERISA the court found. Plaintiffs' real quarrel is with the district court's equitable remedy. But that was a matter committed to the court's discretion.

2. Plaintiffs' unprecedented theory conflicts with the decisions of other courts considering this issue.

Plaintiffs' theory of relief is unprecedented. They can cite no ERISA case authorizing the windfall they seek. In other contexts the federal courts have uniformly held that if a plan's vesting or accrual provisions do not satisfy ERISA's minimum requirements, the appropriate remedy is to maintain the plan's original intent as to accrual and vesting to the extent possible while bringing it into compliance with ERISA's requirements. *E.g., Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980); *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258, 267 (S.D.N.Y. 1997); *Montgomery v. Lowe*, 507 F. Supp. 618, 622 (S.D. Tex. 1981); *Ramirez v. Lowe*, 504 F. Supp. 21, 23 (S.D. Tex. 1979), *aff'd*, 639 F.2d 306 (5th Cir. 1980);

Nedrow v. McFarlane & Hayes Co. Employees' Profit Sharing Plan & Trust, 476 F. Supp. 934, 937 (E.D. Mich. 1979).

Likewise, the Tenth Circuit has explicitly rejected the argument that a plan's failure to contain a vesting provision that complied with ERISA meant that the court was required to assume that participants' benefits fully vested the instant they joined the plan:

> Employee's argument on the effect of ERISA's noncompliance fails to establish the benefit plan provided for vesting. Something more than just the failure of the employer to comply with its duties under ERISA is necessary to establish a right to alleged benefits. Otherwise, ERISA would be turned into a strict liability statute: any time the employer failed to comply with its duties under ERISA, an employee would receive any alleged benefit he or she claims they expected.

Hein v. TechAmerica Group, Inc., 17 F.3d 1278, 1280 (10th Cir. 1994) (footnote omitted).

No court has ever deemed participants' benefits fully vested and accrued because a plan failed to satisfy ERISA's minimum vesting and accrual requirements. The only case Plaintiffs cite that considered the proper remedy in this situation is *Hollingshead v. Burford Equipment Co.*, 747 F. Supp. 1421, 1444-45 (M.D. Ala. 1990). (Petition at 13) That case does not support their position. In *Hollingshead*, Burford was sued after it stopped making payments on an unwritten, informal pension plan. The court rejected Burford's argument that the plan was an exempt top hat plan and exercised its equitable power to award the employees the present value of their accrued benefits.

It did not award damages under Section 1132(a)(1)(B). *See Hollingshead*, 747 F. Supp. at 1444-45. Contrary to Plaintiffs' implication, the court did not simply assume that the absence of valid vesting and accrual schedules meant that the benefits were fully vested and accrued. Instead, the court looked to the plan's intent to determine the amount of accrued benefits. Ultimately the court selected an accrual formula that complied with ERISA and was consistent with the plan's intent. *Id.*; *see also Hollingshead v. Burford Equip. Co.*, 809 F. Supp. 906, 912-16 (M.D. Ala. 1992). This approach was entirely consistent with that taken in the *Hummell* line of cases discussed above as well as that taken by the district court in this case.

3. The Fifth Circuit's decision fully vindicated the policies recognized by this Court in *Central States*.

Plaintiffs assert that the Fifth Circuit's decision contradicts general ERISA principles recognized by this Court in *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985) regarding (1) the policies underpinning ERISA, and (2) the need to protect promised benefits. (Petition at 14-16) *Central States* did not even involve a Section 1132 claim, but rather whether employee benefit plans were entitled to audit certain employer personnel records. Its holdings are thus wholly irrelevant to this case. Moreover, the general ERISA principles discussed in *Central States* provide no support for Plaintiffs' damage theory.

First, Plaintiffs assert that the Fifth Circuit's decision conflicts with the policy recognized in *Central States* of

"protect[ing] the continued well-being and security of employees and their dependents directly affected by ERISA plans." (Petition at 14) But they do not explain how the damages award undermines this policy. Certainly the mere fact that ERISA was designed to protect pensioners does not mean that pensioners automatically win any ERISA lawsuit:

> "No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."

PBGC v. LTV Corp., 496 U.S. 633, 646-47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987)). Reaffirming this principle several years later, this Court recognized that ERISA is "an enormously complex and detailed statute that resolves innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262-63 (1993).

As part of this balancing, ERISA gives employers considerable flexibility when structuring pension plans. For instance, employers are not required to accrue or vest retirement benefits at any faster rate than set forth in ERISA's minimum vesting and accrual schedules. An employer can choose whichever accrual method the employer deems most advantageous to itself, as long as it complies with ERISA's minimum requirements. *See, e.g., Bryant v. Food Lion, Inc.*, 774 F. Supp. 1484, 1490 (D.S.C.

1991). Because ERISA gives employers this flexibility, courts are reluctant to impose vesting and accrual obligations greater than the statutory minimums:

> "Extra-ERISA commitments must be found in the plan documents and must be stated in clear and express language." . . . "Courts may not lightly infer an intent" on the part of a plan to "voluntarily undertake an obligation to provide vested, unalterable benefits."

Spacek v. Maritime Ass'n, ILA Pension Plan, 134 F.3d 283, 293 (5th Cir. 1998) (quoting *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993) and *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994)).

In addition, ERISA gives employers the absolute right to terminate pension plans. *See generally* 29 U.S.C. § 1341(a); *LTV Corp.*, 496 U.S. at 638. Upon termination of a plan an employer is required to pay participants only those benefits that have already accrued and vested under the plan's accrual and vesting schedules. *E.g., In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d 199, 201 (3d Cir. 1983); *PBGC v. Heppenstall Co.*, 633 F.2d 293, 301-02 (3d Cir. 1980); *Berard v. Royal Elec., Inc.*, 795 F. Supp. 519, 524 (D.R.I. 1992). As the Fifth Circuit has held, upon plan termination "an employer must satisfy only the employees' *accrued* benefits under the plan – not benefits that would accrue in the future if the employees continued to work for the employer." *May v. Houston Post Pension Plan*, 898 F.2d 1068, 1070 (5th Cir. 1990) (emphasis in original). Indeed, "[n]o case has ever held that, when a defined benefit plan terminates, an employer is required to pay an employee retirement benefits based on future years of service not yet worked." *Blessitt v. Retirement*

Plan for Employees of Dixie Engine Co., 848 F.2d 1164, 1172 (11th Cir. 1988). To the contrary, "benefit accrual ceases when a plan terminates." *Id.* at 1171.

Thus, nothing in ERISA supports the idea that the Fifth Circuit was obligated to treat Plaintiffs' benefits as fully vested and accrued as a matter of public policy. Against this legal backdrop, the district court properly recognized that awarding damages based on ERISA's minimum vesting and accrual schedules fully vindicated the Congressional policy of assuring the "equitable character" of pension plans. (App. at 39)

Second, Plaintiffs assert that when Randalls terminated the MSP it was required to pay the participants their full age 65 benefits because they had been "promised" by Cullum. (*E.g.*, Petition at 5-6, 14-15) However, as previously explained, the MSP expressly stated that Cullum could terminate the MSP and pay the participants only the money they had paid into the Plan. The district court found that no

> representation was made by the employer to the participants that would justify a reasonable belief by the participants that . . . their rights under the MSP were greater than, or different from, the rights and obligations described in the plan document and the plan agreements . . . .

(App. at 33)

Plaintiffs simply will not accept this finding of fact. Instead, Plaintiffs contend that the MSP's unexpressed "lawful terms" promised them the benefits to which they would have been entitled had the Plan remained in force and had they continued to participate in the Plan until

they reached the retirement age of 65. (*E.g.*, Petition at 8-10, 14-15) This argument simply twists the employer's alleged promise. The plan documents expressly provided that the Plan could be terminated at any time. Nothing in the Plan suggested, much less stated, that upon termination the MSP participants would receive all the benefits they would have received if the Plan had not been terminated and they remained in the Plan until they retired at age 65. As the district court found, there was no forfeiture of any "promised" benefits.

4. Neither ERISA's fiduciary duty provision nor trust law supports the conclusion that Plaintiffs' age 65 benefits were fully vested and accrued.

Plaintiffs also argue that ERISA's fiduciary duty provision (29 U.S.C. § 1104) requires fiduciaries to follow plan documents only "insofar as such documents are . . . consistent with the provisions of this title [ERISA]." (Petition at 11) Relying on this language, Plaintiffs extrapolate that Section 1104 required the Fifth Circuit to assume that the participants' age 65 benefits were fully vested and accrued when they entered the Plan. Plaintiffs' extensive reliance on *Northeast Department ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985) underscores the weakness of this argument. *Northeast Department* neither involved a pension plan nor addressed the remedy for a plan's failure to comply with ERISA's vesting and accrual requirements. In that declaratory judgment action two benefit plans had denied health benefits to an insured on the basis that the other plan covered her treatment. *See id.*

at 150. In particular, one of the plans contained an "escape clause" that purported to exclude insurance coverage in its entirety if the insured was also covered by other health insurance. *See id.* at 160-61. The Third Circuit held that the trustees of this plan violated their fiduciary duties by including this escape clause because it deprived participants of benefits that they reasonably expected. Consequently, the court concluded, the clause was unenforceable. *See id.* at 163-64. In our case, the district court ignored the plan provisions that, in its view, violated ERISA and exercised its discretion to award the amount of benefits that ERISA protected. Thus, the district court's ruling complied with any directive in Section 1104 to ignore plan terms that are contrary to ERISA. There is no conflict between this case and *Northeast Department*.

Plaintiffs' remaining fiduciary duty authority does not dictate a different result. Those cases merely state that a fiduciary must disregard plan provisions to the extent they conflict with ERISA. (Petition at 12-13) The district court's award of equitable relief based on ERISA's requirements fulfilled any obligation to disregard provisions to the extent they conflict with ERISA. These cases do not support Plaintiffs' leap in logic that their full age 65 benefits must be deemed fully vested and accrued as a matter of law.

Plaintiffs also cite general trust law principles to support their argument that the Fifth Circuit was required to assume their benefits fully vested and accrued as soon as they joined the MSP. (Petition at 16-17) However, this Court has held that "[a]lthough trust law may offer a 'starting point' for analysis in some situations, it must give way if it is inconsistent with 'the

language of the statute, its structure, or its purposes.' " *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)). Plaintiffs concede that trust law is relevant only "to the extent compatible with ERISA." (Petition at 16) As we have previously discussed, many courts have already considered the issue of what remedy to provide for the failure of an ERISA plan to comply with the minimum vesting or accrual requirements. Not one has ever answered the question by reference to general principles of trust law. Invariably, they are guided by ERISA's minimum vesting and accrual requirements themselves. That is, they reform the plan to the extent necessary to bring it into compliance with ERISA's minimum requirements while maintaining the plan's original intent. Consequently, there is no room for applying general trust law principles to the statute-specific issue of vesting and accrual of benefits.

5. None of ERISA's remaining statutory provisions supports Plaintiffs' argument.

Plaintiffs also cite ERISA's definitions of the terms "nonforfeitable" and "accrued benefit" to justify their argument that setting aside the "illegal" provisions means that their age 65 retirement benefits were fully vested and accrued. *See* 29 U.S.C. §§ 1002(19), 1002(23)(A). (Petition at 17-19) These statutory provisions merely state that the amount of the vested and accrued benefit is determined by looking to the plan's terms. They do not establish the remedy for violations of ERISA's minimum vesting and accrual requirements. Similarly, 29 U.S.C. § 1102(a)'s requirement that a plan be in writing is

irrelevant here. (Petition at 19-20) The MSP was written; the fact that its written terms did not comply with ERISA's vesting and accrual requirements does not mean that participants' benefits were fully vested and accrued. *See, e.g., Hein*, 17 F.3d at 1280-81; *Hollingshead*, 809 F. Supp. at 912-16.

II. The award of equitable relief was not an abuse of discretion.

Because Plaintiffs did not have a claim for benefits due, the district court based its remedy on Section 1132(a)(3), which authorizes civil actions "to obtain other appropriate equitable relief . . . to redress any act or practice which violates any provision of [ERISA]." This provision creates an equitable remedy where, as here, a plan participant gets everything he is entitled to receive under the terms of a plan, but not everything he is entitled to receive under ERISA. Because Plaintiffs did not have a claim for benefits due, the decision to award equitable relief was proper.

Plaintiffs cannot and do not contend that the district court's choice of equitable relief was an abuse of discretion. The award put the Class in the financial position they would have occupied had the MSP complied with ERISA's minimum vesting and accrual provisions. The logic behind this award was sound. Had the MSP complied with ERISA's statutory minimums, Randalls would have had the right to terminate the MSP and pay the Class only benefits calculated in accordance with those minimums. In that event, the Class would have received ERISA's protections and they would have had no claim

against Randalls. Thus, this equitable remedy fully vindicated ERISA's objectives.

While Plaintiffs do not directly attack the nature of the equitable relief, they complain that the district court used a hypothetical accrual method and allowed Randalls to create a new plan. (*E.g.*, Petition at 9, 13-14) In fashioning its equitable remedy, the district court did not allow Randalls to create a new plan. To the contrary, the court simply applied ERISA's vesting and accrual requirements to determine what benefits were statutorily protected. That relief was not an abuse of discretion. In fact, it is Plaintiffs who seek to create a new plan. Under the guise of a claim for benefits due they would have this Court convert the MSP from a plan in which benefits vested and accrued at retirement into a plan in which benefits fully vested and accrued upon entry into the plan. There is no legal, logical, or equitable basis for that result.[3]

---

[3] Plaintiffs also assert that the district court's decision encourages employers to violate ERISA because they can always adopt a new plan *ex post facto*. (Petition at 13-14) But Section 1132(a)(3) gives the district court discretion to determine what is "appropriate equitable relief." The district court found that Cullum believed in good faith that the MSP was a top hat plan. (App. at 8-10, 16-18) Plaintiffs do not challenge that finding and do not contend that the district court abused its discretion in fashioning the Class's appropriate equitable relief. There is no need for this Court to offer an advisory opinion on the question of whether employers can be obligated to pay more than the statutory minimums if they deliberately flout ERISA.

III. In any event, the question presented by the petition does not need Supreme Court resolution.

Finally, this case does not present an important federal issue on which the lower federal courts need guidance from this Court. This case concerns an issue that to our knowledge no other court has considered: Where a court concludes that a terminated pension plan was not an exempt top hat plan, what is the remedy for plan participants who were not paid upon plan termination the amount of benefits that ERISA required to be vested and accrued? Although ERISA was created 27 years ago, only one other case that we know of – *Hollingshead* – has presented even the more general question of the remedy available to pension plan participants when an ostensibly-exempt top hat plan that does not comply with ERISA's vesting and accrual requirements is found not to be a top hat plan. However, in other contexts the lower federal courts have fashioned the very sensible rule that the remedy for violations of ERISA's minimum vesting and accrual requirements is measured by the amount necessary to bring the plan in question into compliance with those statutory requirements. This remedy fully satisfies ERISA and its underlying policies. In this case the trial court adopted that same approach, and the Fifth Circuit concurred.

Contrary to Plaintiffs' argument, the Fifth Circuit's decision does not conflict with any decision of this Court, and there is no split among the circuits. Plaintiffs' reliance on this Court's decision in *Central States* and the Third Circuit's decision in *Northeast Department* – neither of which even involved ERISA's vesting and accrual

requirements – highlights the absence of a basis for Plaintiffs' position. Accordingly, no reason exists for this Court to grant the petition. *See* SUP. CT. R. 10.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID T. HARVIN
Counsel of Record
WALLIS M. HAMPTON
VINSON & ELKINS L.L.P.
2300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2368 (Telephone)

Counsel for Respondent

No. 01-348

In The

Supreme Court of the United States

JOE CARRABBA, JR., Et Al., Individually and on Behalf of All Others Similarly Situated,

Petitioners,

v.

RANDALLS FOOD MARKETS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

TABLE OF CONTENTS

Page

29 U.S.C. § 1051(2) ..... App. 1

29 U.S.C. § 1053(a) ..... App. 1

29 U.S.C. § 1054(a), (b) ..... App. 2

29 U.S.C. § 1132(a) ..... App. 5

29 U.S.C. § 1051(2): Coverage.

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than . . . (2) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. . . .

---

29 U.S.C. § 1053(a): Minimum Vesting Standards.

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A) or (B).

(A) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service: The nonforfeitable percentage is:

3	20
4	40
5	60
6	80
7 or more	100

---

29 U.S.C. § 1054(a), (b): Benefit Accrual Requirements.

(a) Satisfaction of requirements by pension plans

Each pension plan shall satisfy the requirements of subsection (b)(3) of this section, and – (1) in the case of a defined benefit plan, shall satisfy the requirements of subsection (b)(1) of this section. . . .

(b) Enumeration of plan requirements

(1)(A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than –

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of

age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of $33^1/_3$) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than $133^1/_3$ percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph –

(i) any amendment to the plan which is in effect for the current year shall be

treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation

from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

---

29 U.S.C. § 1132(a): Civil Enforcement.

(a) Persons entitled to bring a civil action.

A civil action may be brought

(1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .

. . .

(3) by a participant, beneficiary, or fiduciary . . . (B) to obtain other appropriate equitable relief.